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No. 96-660

In the Supreme Court of the United States

OCTOBER TERM, 1996

ALBERT L. LASSITER, PETITIONER

v.

JANET RENO, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner, who has a paranoid personality disorder, is not qualified to work as an armed law enforcement officer because his employment poses a significant risk to the safety of himself or others.

2. Whether the court of appeals correctly affirmed the district court's determination that the United States Marshals Service could not reasonably accommodate petitioner's disability, where the Marshals Service attempted to reassign petitioner, and its attempt predated any statutory obligation to accommodate employees with disabilities through appropriate reassignment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is unpublished, but the decision is noted at 86 F.3d 1151 (Table). The opinion of the district court (Pet. App. 17a-28a) is reported at 885 F. Supp. 869.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 1996. A petition for rehearing was denied on July 26, 1996. Pet. App. 14a-15a. The petition for a writ of certiorari was filed on October 23, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On May 1, 1992, the United States Marshals Service terminated petitioner Alfred Lassiter's employment as a United States deputy marshal, after considering reports by four psychiatrists who diagnosed petitioner as suffering from a delusional (paranoid) personality disorder or paranoid personality disorder. Pet. App. 4a-5a, 17a. Deputy marshals investigate and apprehend fugitives from justice, seize and dispose of assets under forfeiture laws, provide courtroom security, execute civil and criminal court process, and transport prisoners. *Id.* at 9a n.6. Because of the risk of hostile and dangerous situations, deputy marshals carry firearms. *Id.* at 9a.

In late 1990 petitioner began to suspect that his elderly neighbor and other, unidentified persons were conspiring to burglarize his home. Pet. App. 2a. The Chesterfield County Police Department conducted an investigation and concluded that no such conspiracy existed. *Id.* at 3a. Nonetheless, petitioner remained convinced that he was the target of a burglary conspiracy and devised a plan to thwart the burglars. To convince the burglars that he had left home for the Christmas holidays, he parked his car away from his house and concealed his presence in the house by refusing to answer the telephone, turn on the lights, pick up mail, wash dishes, cook food, or flush the toilets. Arming himself with both government-issued and privately-owned weapons and wearing a bullet-proof vest, *id.* at 18a, he awaited the burglars, sleeping by day and staying awake at night, *id.* at 3a. He stayed in contact with the police, telling dispatchers that he was armed with a double-barreled shotgun and a .45 caliber automatic pistol. He announced that the

burglars would be able to take his United States Marshals' armband from him only if he were dead. *Ibid.*

On December 23 a neighbor complained to the police that petitioner was armed and threatening to kill people. Pet. App. 3a. When police came to investigate, petitioner refused to open his door. In the early hours of December 24, police responded to a telephone call from petitioner himself and found him wearing the bullet-proof vest and armed with an automatic weapon, two magazine rounds, and a night-vision scope. *Ibid.* After noticing the unwashed dishes, the unflushed toilets, the firearms, and petitioner's agitation, the police secured a temporary detention order to have petitioner committed for psychiatric evaluation. *Ibid.*

Petitioner then voluntarily admitted himself to Charter Westbrook Hospital. Pet. App. 18a. During his stay, he became persuaded that the doctors, the staff, his hospital roommate, members of the police department, his pharmacist, and his neighbors were all involved in a conspiracy against him. *Id.* at 4a.

At the request of the United States Marshals Service, Dr. Thomas Mathews examined petitioner shortly after his hospital stay. Pet. App. 4a. Dr. Mathews diagnosed petitioner's condition as a delusional (paranoid) personality disorder. Persons suffering from this disorder have persecutory delusions, "are often resentful and angry, and may resort to violence against those they believe are hurting them." *Id.* at 4a n.2 (quoting the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1987) (DSM-IIIR)). Dr. Mathews recommended that petitioner be relieved of his firearm and of any duties that might require him to be armed. When the Marshals Service responded that it

would be impossible for petitioner to serve as a deputy marshal without carrying a gun, Dr. Mathews recommended that petitioner be declared medically unfit for duty. *Id.* at 4a.

Petitioner then consulted three psychiatrists. Dr. Stern and Dr. Hanback diagnosed him with paranoid personality disorder. Pet. App. 4a-5a. "[T]he essential feature of this disorder is a pervasive and unwarranted tendency * * * to interpret the actions of people as deliberately demeaning or threatening." *Id.* at 4a-5a n.3 (quoting DSM-IIIR). Both Dr. Stern and Dr. Hanback recommended that petitioner be permitted to return to work, although Dr. Hanback suggested that petitioner obtain psychiatric treatment before regaining the right to carry a firearm. *Id.* at 4a-5a. Dr. Travis suggested that petitioner be evaluated by a specialist in paranoid disorders. *Id.* at 5a.

After considering the doctors' evaluations, the Marshals Service decided that petitioner no longer could serve as a deputy marshal. Pet. App. 5a. In May 1992, after trying unsuccessfully to find a nearby position for petitioner that did not involve carrying a firearm, the Marshals Service terminated petitioner's employment. *Ibid.* Petitioner then consulted a fourth psychiatrist, who also diagnosed his condition as paranoid personality disorder. *Ibid.*

Petitioner sought administrative relief, alleging disability discrimination in violation of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.* Both the Merit Systems Protection Board and the Equal Employment Opportunity Commission concluded that the Marshals Service did not discriminate against petitioner. Pet. App. 5a-6a n.4. Petitioner then filed suit, again alleging, among other things, that his termi-

nation violated the Rehabilitation Act.* The district court granted summary judgment against petitioner. *Id.* at 17a-28a. It concluded that he had not demonstrated a prima facie case of discrimination because he had not raised a genuine issue of material fact about his inability to perform the essential job function of carrying a firearm, either with or without a reasonable accommodation. *Id.* at 26a-27a.

The court of appeals affirmed. Pet. App. 1a-13a. The court found no evidence to contradict "the overwhelming evidence in the record that [petitioner], when carrying a firearm in the course of his duties, poses a significant risk to the safety of himself and others." *Id.* at 11a. Citing expert testimony that a person with a paranoid personality disorder is likely to "read * * * threatening meanings into benign remarks or events," the court concluded that, "[g]iven the duties of a deputy marshal, a significant risk to the safety of others can arise * * * from a tendency to misperceive the true nature of events." *Ibid.* The court of appeals also affirmed the district court's holding that there is no reasonable accommodation for petitioner's disability available to the Marshals Service. *Id.* at 12a-13a.

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* Petitioner sued the United States Marshals Service; its director, Eduardo Gonzalez; Attorney General Janet Reno; and Helen Fahey, the United States Attorney for the Eastern District of Virginia. Pet. App. 19a. The district court held that only Attorney General Reno was a proper party to the action. *Id.* at 22a. The court dismissed petitioner's claims against the other defendants, *ibid.*, and petitioner did not appeal the order of dismissal, *id.* at 6a.

ARGUMENT

The decision of the court of appeals is correct in all respects. Its conclusion that petitioner is not otherwise qualified to perform the essential functions of a deputy marshal is correct under *School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987), and does not conflict with any decision of this Court or another court of appeals. A federal employer's obligation to accommodate employees with disabilities through appropriate reassignments has been determined by Congress and requires no further elaboration by this Court.

1. The Rehabilitation Act of 1973 prohibits a federal employer from discriminating against an "otherwise qualified" employee solely on the basis of his disability. 29 U.S.C. 794. This Court's decision in *Arline* sets forth the applicable legal standard for determining when serious health and safety risks created by an employee's disability render that employee not "otherwise qualified" for his or her employment, and the lower federal courts have applied that standard in a consistent manner.

Arline involved an elementary school teacher whose disability—tuberculosis—presented a potential risk to the health and safety of others, including her students. 480 U.S. at 275. Observing that employers must "avoid[] exposing others to significant health and safety risks," *id.* at 287, this Court held that "[a] person who poses a significant risk * * * to others in the workplace will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk," *id.* at 287 n.16. To determine whether such a risk is significant, courts are to look not only to the probability of harm, but also to the

nature, duration, and severity of the potential harm. *Id.* at 288.

The lower federal courts have uniformly applied *Arline*'s holding that an employee is not "otherwise qualified" when his or her disability creates a "significant risk" to health or safety. See, *e.g.*, *Doe* v. *University of Maryland Medical Sys. Corp.*, 50 F.3d 1261, 1265-1267 (4th Cir. 1995) (HIV-positive surgeon was not "otherwise qualified" because he posed a significant risk of harm to his patients); *Chiari* v. *City of League City*, 920 F.2d 311, 316 (5th Cir. 1991) ("[C]ourts * * * unanimously have held that a handicapped individual cannot perform the essential functions of a job if his handicap poses a significant safety risk to those around him."); *Scoles* v. *Mercy Health Corp. of Southeastern Pennsylvania*, 887 F. Supp. 765, 770-771 (E.D. Pa. 1994) (HIV-positive orthopedic surgeon not "otherwise qualified"); *Mauro* v. *Borgess Medical Ctr.*, 886 F. Supp. 1349, 1352-1354 (W.D. Mich. 1995) (HIV-positive surgical technician not "otherwise qualified"); cf. *Altman* v. *New York City Health & Hosps. Corp.*, 903 F. Supp. 503, 508-514 (S.D.N.Y. 1995) (doctor's alcoholism rendered him unqualified because of the significant risk to patients), aff'd, No. 95-9053, 1996 WL 670611 (2d Cir. Nov. 21, 1996). Applying *Arline*, the court of appeals in this case correctly inquired "whether [petitioner] poses a significant risk to the safety of himself or others." Pet. App. 11a. The court then correctly concluded that he did.

Petitioner argues (Pet. 12-14) that the court of appeals' decision is in direct conflict with *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985). In that Rehabilitation Act case, the Ninth Circuit directed an inquiry into whether an employee with a disability

posed "a reasonable probability of substantial harm" to himself or others. *Id.* at 1424. *Mantolete*, however, preceded *Arline*. The Ninth Circuit now applies *Arline*'s "significant risk" standard in a manner consistent with the other lower federal courts. See, *e.g.*, *Chalk* v. *United States Dist. Court*, 840 F.2d 701, 705-706 (1988).

Petitioner further argues (Pet. 13) that he is qualified to work as a deputy marshal because the possibility that he might injure somebody while on armed duty is "not only * * * improbable, but practically non-existent." The evidence, however, is to the contrary. All five psychiatrists who examined petitioner diagnosed him as suffering from, at the very least, a paranoid personality disorder that predisposed him to interpret benign events as hostile. Accordingly, the court of appeals concluded that, because a "deputy marshal must have the ability to decide in an instant whether the use of deadly force is warranted," petitioner's inability to distinguish benign events from threatening ones rendered him unqualified for service as an armed deputy marshal. Pet. App. 11a.

That conclusion is correct under *Arline*, which holds that a risk of serious injury or death may be "significant" even if the probability of its occurrence is low. See 480 U.S. at 288; *Bradley* v. *University of Texas M.D. Anderson Cancer Ctr.*, 3 F.3d 922, 924 (5th Cir. 1993) ("While the risk is small, it is not so low as to nullify the catastrophic consequences of an accident."), cert. denied, 510 U.S. 1119 (1994); *Scoles*, 887 F. Supp. at 769 ("*Arline* directs the court to weigh the duration and severity of the risk."); *Mauro*, 886 F. Supp. at 1353 ("The evidence that the probability of transmission is very small * * * does not alter

the facts that transmission is possible and invariably lethal."). Here, the lower courts agreed that the risk of harm was significant, if not substantial. See Pet. App. 26a (district court concluded that allowing petitioner to carry a firearm "would pose a 'reasonable probability of substantial harm' to [himself] and to others"); *id.* at 11a (court of appeals citing "overwhelming evidence" that petitioner, "when carrying a firearm in the course of his duties, poses a significant risk to the safety of himself and others"). Because the lower courts correctly analyzed the evidence under this Court's *Arline* standard, further review of this factual determination about the risks involved in this case is not warranted.

2. Petitioner asks this Court (Pet. 15) to determine whether a federal employer's duty under the Rehabilitation Act to make a reasonable accommodation "includes job reassignment where appropriate." Congress, however, has already made that determination. Its 1992 amendment to the Rehabilitation Act, together with implementing regulations, imposes upon federal employers a new duty to accommodate their employees' disabilities through appropriate reassignment. See 29 U.S.C. 794(d) (incorporating the standards applied under Title I of the Americans with Disabilities Act of 1990 (ADA) to Rehabilitation Act disability discrimination claims); 42 U.S.C. 12111(9)(B) (under the ADA, an employer's "reasonable accommodation" "may include * * * reassignment to a vacant position"); 29 C.F.R. 1614.203(g) ("[A]n agency shall offer to reassign [an] individual [with disabilities] to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level."). Accordingly, the existence or na-

ture of a federal employer's obligation to reassign employees with disabilities is not a matter of continuing concern requiring this Court's attention.

Moreover, the court of appeals correctly concluded that a federal employer's duty to accommodate an employee through an appropriate reassignment is not implicated by this case. Pet. App. 13a n.8. First, the 1992 amendment did not become effective until nearly six months after the Marshals Service terminated petitioner. *Ibid.* See *Shiring* v. *Runyon*, 90 F.3d 827, 831-832 (3d Cir. 1996) (noting that, "[a]lthough reassignment was an option under the 1990 Americans with Disabilities Act," before the 1992 amendment "it was not required of federal employers under the Rehabilitation Act"). Second, the court of appeals concluded that, even if the new provisions did apply to this controversy, the Marshals Service discharged its duty under those provisions because no vacant, funded position existed within petitioner's commuting area. Pet. App. 13a n.8; see *id.* at 26a (district court finding that the Marshals Service attempted and failed to locate a vacant position within the Eastern District of Virginia that did not require carrying a firearm). This Court's review of that factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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